

LIKE WATER FOR CONFLICT: 527 REGULATION AND THE TRICKLE- DOWN EFFECT

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I.

INTRODUCTION: THE 527 REFORM ACT

The Bipartisan Campaign Reform Act of 2002 (BCRA)¹, also known as the McCain-Feingold Act, was enacted to limit the amount of so-called “soft money” (money not subject to federal contribution limits and source prohibitions)² used in federal political campaigns. However, due to subsequent regulations issued by the Federal Elections Commission (FEC)³ —the agency charged with interpreting the law—issue-based political organizations that were tax-exempt under section 527 of the Internal Revenue Code (527s) were able to escape the contribution limits imposed on political parties, campaign committees, candidates, and officials, while continuing to engage in thinly-veiled partisan activities.⁴ The 527 Reform Act of 2004 (527 Act)⁵ has been proposed as part of a multi-faceted overall strategy to deal with the problematic FEC regulations.⁶ The 527 Act would require organizations exempt under section 527 to register as political committees under the Federal Election Campaign Act of 1971 (FECA). It

1. Pub. L. No. 107-155, 116 Stat. 81, *available at* http://www.fec.gov/pages/bcra/xmajor_resources_bcra.htm.

2. *See* 2 U.S.C. § 441(a), (b).

3. Federal Elections, 11 C.F.R. §§ 100.24(a)(3), 100.24(a)(4), 100.25, 100.29(b)(3)(i), 100.29(c)(6), 109.21(c), 109.3, 300.2(b), 300.2(m), 300.2(n), 300.33(c)(2), 300.33(c)(4), 300.64(b) (2004).

4. Critics have charged the FEC with being a captured agency, responsible for loopholes and laxity in enforcing election laws. *See* News Conference, Federal News Service, Campaign Finance Reform Legislation (Sept. 22, 2004) (on file with the New York University Journal of Legislation and Public Policy).

5. S. 2828, 108th Cong. (2004). *See also* H.R. 5127, 108th Cong. (2004).

6. The 527 Act’s sponsors, believing that the FEC should be regulating 527 groups under the Federal Election Campaign Act already, have also sued the FEC, resulting in a district court ruling which declared fifteen FEC regulations to be illegal. *Shays v. F.E.C.*, No. 02-1984, 2004 U.S. Dist. LEXIS 18694 (D.C. Cir. Sept. 18, 2004), *stay pending appeal denied*, No. 02-1984, 2004 U.S. Dist. LEXIS 20914 (D.C. Cir. Oct. 19, 2004). Additionally, the Act’s sponsors have publicly stated an intention to restructure the FEC itself next year. *See* News Conference, *supra* note 4.

accomplishes this by codifying the “major purpose” test of *Buckley v. Valeo*⁷ in defining “political committee.”⁸

The 527 Act’s strategy of dealing with the FEC regulations, of which the 527 Act is only one part, is based on fear of an unregulated flood of money into the political system. This must be stopped with sandbags placed strategically at the legislative, judicial, and agency levels. As the oft-quoted majority opinion in *McConnell v. FEC*—the case upholding the major provisions of BCRA—states, “Money, like water, will always find an outlet.”⁹ Some even claim that trying to limit money will only make things worse, and that instead reformers should increase disclosures to let voters make their own judgments.¹⁰ Though critics of the 527 phenomenon in the 2004 election cycle assert that BCRA has failed in its purposes, this is not entirely the case. Even with the existing soft money loopholes, BCRA has already reduced the corporate campaign spending norms of the 1990s.¹¹ At the same time, however, BCRA and the proposed 527 reforms shift the concentration of political influence in ways that still pose challenges to “one man, one vote” democracy. The 527 Act increases the influence of individuals without necessarily making the process truly representative. Additionally, it leaves unregulated the activities of many nonprofit organizations and some 527s on the state level, which could influence the national political debate without proportional national transparency.

II.

INDIVIDUAL DONATIONS

Critics have said the rise of 527s merely allowed the unregulated money banned by BCRA to be used by third party groups in place of the political parties that could not receive the money under the regulations.¹² However, this analysis is too simple. A detailed look at

7. 424 U.S. 1, 79 (1976). Under the 527 Act, a 527 (with few exceptions) is presumed to have “as its major purpose the nomination or election of one or more candidates,” thus falling under the definition of “political committee” for the purposes of federal election law.

8. S. 2828 § 2(a), (b).

9. No. 02-1674 (U.S. Dec. 10, 2003) (upholding majority of BCRA as constitutional).

10. Thomas Bray, *Campaign Reforms Just Make Things Worse*, DETROIT NEWS, Sept. 29, 2004, at 15A, available at <http://www.detnews.com/2004/editorial/0409/29/a15-287374.htm>.

11. See Jeanne Cummings, *Closing the Spigot: In New Law’s Wake, Companies Slash Their Political Donations*, WALL ST. J., Sept. 3, 2004, at A1.

12. See, e.g., George Will, *Campaign Finance Law is a Constitutional Obscenity*, TOWNHALL.COM, Feb. 22, 2004 (stating that “McCain-Feingold’s ban on large soft

BCRA's contribution limits shows that BCRA has reduced corporate influence in favor of the empowerment of individuals. For instance, unregulated 527 contributions are generally different in kind from the pre-BCRA soft money contributions to federal campaigns. Corporate donors in general have greatly reduced political donations to as little as 10% of previously unregulated donations.¹³ Corporate donations essentially bought access to candidates and tended to be oriented towards legislation and regulation affecting the company, rather than motivated by ideology.¹⁴ Corporations have mostly opted out of donating to 527s; instead, individuals are the primary donors to 527s. The goal of BCRA was to get soft money from corporations out of politics, under the theory that individual contributions will subsequently matter more, and politicians will be responsive to citizens rather than to corporations. BCRA accomplished this. Some of the benefits have already been realized in terms of increased voter participation.¹⁵

The problem of corporate-influenced elections has not been solved, however. Though soft money is restricted, corporations can still wield influence through the hard money provided by their Political Action Committees (PACs), money which is even more crucial for campaigns in the wake of the soft money ban.¹⁶ For instance, since 2002 there has been a scramble by law firms to form or further utilize existing PACs.¹⁷ Additionally, since national political convention host committees are considered charitable organizations conducting educational activities, corporations can contribute unlimited amounts

money contributions to political parties has spawned many groups, mostly liberal ones, to receive and spend such contributions as surrogates for the parties"), at <http://www.townhall.com/columnists/georgewill/gw20040222.shtml>.

13. See Cummings, *supra* note 11 (stating that "[o]f the top 10 corporate political donors in 2000, which contributed more than \$21 million in total to both parties, not one is giving to the 527s").

14. See Craig Holman & Joan Claybrook, *Outside Groups in the New Campaign Finance Environment: The Meaning of BCRA and the McConnell Decision*, 22 YALE L. & POL'Y REV. 235, 251 (2004) (stating that "[s]oft money may continue to flow into federal elections through non-profit groups, but nonprofits are an arm's length away from officeholders. A \$100,000 soft money contribution to the NRA, for example, is not as likely to buy a sleep-over in the Lincoln bedroom").

15. For instance, Democrats claim to have quadrupled their small-donor base since the last election. See Nancy Gibbs, *Blue Truth, Red Truth*, TIME, Sept. 27, 2004, at 24, 33. However, the number of donors does not necessarily track voter support. See *id.* at 33 (noting that in 1960 Barry Goldwater had 650,000 individual donors compared to John F. Kennedy's 22,000).

16. See Cummings, *supra* note 11 (discussing the increased use of get-out-the-vote campaigns to target employees).

17. Lisa Lerer, *PAC Mentality: The Days of Discreet Law Firm Campaign Donations are Gone*, AM. LAW., Oct. 1, 2004, at 18-19.

to them. This resulted in twelve times as much money spent on conventions this election year as in 1992.¹⁸ The 527 Act falls short in that, in effect, it only regulates a particular kind of soft money—that of individuals and unions—and in so doing may even allow increased influence by the few corporate avenues open post-BCRA.

Critics of the 527 Act often highlight the large contributions of wealthy individual donors such as financier George Soros and corporate raider T. Boone Pickens.¹⁹ The proposed reforms bring 527s under the FECA definition of a political committee, limiting individual contributions to \$5,000 for a federal account and \$25,000 to a qualified non-federal account.²⁰ This limit prevents wealthy individuals from making the kind of multi-million dollar contributions to 527s that have gotten so much attention during this election cycle.²¹ However, there is nothing to stop such individuals from going at it alone and waging an attack campaign. Proponents of the 527 Act counter that public perception will act as a deterrent to such campaigns;²² yet prominent individual contributors like Soros have already been vilified for their 527 contributions, which are publicly disclosed,²³ and have continued to donate.²⁴ In fact, it was several months after the criticism of Soros' 527 involvement began that he branched out to conduct his own political activities, including a speaking tour and ad campaign.²⁵

Allowing even the limited but still considerable individual contributions in the 527 Act does not go far enough to promote more representative politics.²⁶ For instance, a study analyzing donor zip codes demonstrated that campaign money comes disproportionately from

18. Kimberley A. Strassel, *The Cash That Dare Not Speak His Name*, WALL ST. J., July 30, 2004, at A10 (noting that committees were able to spend \$103 million on conventions for both parties this year).

19. Glen Justice, *New Pet Cause for the Very Rich: Swaying the Election*, N.Y. TIMES, Sept. 25, 2004, at A12.

20. See S. 2828, 108th Cong. § 4 (2004).

21. See, e.g., Justice, *supra* note 19.

22. See, e.g., News Conference, *supra* note 4 (providing statement by Sen. McCain that "Mr. Soros doesn't want to see his name. . . 'Paid for by George Soros' . . .").

23. Pub. L. No. 106-230, 114 Stat. 477 (2000) (requiring donor disclosure to the IRS for most 527s).

24. See, e.g., Jane Mayer, *The Money Man: George Soros's Investment in Defeating Bush*, THE NEW YORKER, Oct. 18, 2004, at 180–81, 188–89 (noting that Soros has been called a "sleazoid" and a "self-hating Jew" for his efforts).

25. See *id.* at 181. See also Press Release, George Soros, George Soros on Tour to Challenge Bush on Iraq War, Foreign Policy, at <http://www.georgesoros.com/index.cfm?Fuseaction=PPressReleaseHTML> (last visited Oct. 20, 2004).

26. Even one of the Act's sponsors would prefer lower contribution limits with the incentive of public financing. Interview, *Campaign Finance Reform: Senator Russell D. Feingold*, 22 YALE LAW & POL'Y REV. 339, 342–43 (2004).

predominantly white neighborhoods.²⁷ Since individuals tend to contribute more from ideological urges, BCRA has tended to increase the importance of ideology in elections. The 527 Act changes the composition of the pool of individuals whose ideology will have the potential to most influence the political process. In doing so, the capacity of low-income and minority monetary contributions to influence this campaign of ideology is diluted by such high ceilings on giving.

III.

IMPACT ON NON-FEDERAL SELECTION PROCESS

The 527 Act mandates that when 527s conduct voter drive activities, such as registration and other get-out-the-vote campaigns which mention a political party and a non-federal candidate, they must pay at least fifty percent of expenses from a federal account.²⁸ There is an exception for elections in which no federal candidates appear on the ballot,²⁹ but many important state elections occur simultaneously with federal contests. Increased turnout from, say, a hotly-contested race for non-federal candidates of a particular party also tends to benefit federal candidates, not only impacting congressional races but also presidential contests.³⁰ Presumably, the reformers wanted to prevent gamesmanship on that basis. However, exempted from regulation is activity on behalf of non-federal nonpartisan candidates or state and local ballot measures. Controversial issues, such as minimum wage initiatives and bans on gay marriage, increase voter turnout of groups more strongly allied with one party or another.³¹ Such activity could be a draw for soft money drained from the broader 527 swamp, since it is subject to state campaign regulations and enforcement, which can

27. See *Color of Money 2003: Campaign Contributions, Race, Ethnicity and Neighborhood* (Dec. 2003) (showing that nine of every ten federal campaign dollars spent in the 2000 and 2002 elections came from non-Hispanic white neighborhoods, though 28% of adult Americans are persons of color), at <http://www.colorofmoney.org/report/com112103.pdf> (last visited Oct. 1, 2004).

28. S. 2828, 108th Cong. § 4 (2004).

29. *Id.*

30. Because of the electoral college, in close presidential races the outcome of a single state may be determinative. See, e.g., Danny Westneat, *Ohio: The Real Battleground*, SEATTLE TIMES, Oct. 20, 2004, at A1 (stating that “[the presidential candidates] have shrunk a national election to the point that much of the political arsenal in the United States is raining down on unassuming places such as Xenia, a town of 24,000”), available at http://seattletimes.nwsourc.com/html/dannywestneat/2002067737_danny20m.html.

31. See, e.g., Walter Shapiro, *Ohio Churches Hope Marriage Ban Prods Voters to Polls*, USA TODAY, Sept. 27, 2004, at 10A, available at http://www.usatoday.com/news/opinion/columnist/shapiro/2004-09-26-hype_x.htm.

vary considerably³²—from states like Maine that have public financing³³ to states like Texas which have no individual contribution limits.³⁴ More than sixty of the 300-plus committees registered with the Internal Revenue Service (IRS) as 527s focus on state activity, and raised \$56 million through June 30, 2004 (the end of the last filing cycle)³⁵ which indicates the attractiveness of states as a forum for ideologues. For instance, the U.S. Chamber of Commerce essentially campaigned against Washington State Attorney General candidate Deborah Senn during the primaries by placing \$1.5 million in television ads anonymously through the Voters Education Committee, a 527 group with little name recognition.³⁶ The state's Public Disclosure Commission ultimately made the Voters Education Committee disclose its source, but not until less than a week before the election, after many ads had already run.³⁷ The U.S. Chamber is involved in twenty-five State Supreme Court and Attorney General campaigns across the country.³⁸ Campaign money has also seen a dramatic increase in prominence for State Supreme Court judges, the majority of whom are elected.³⁹ For instance, in Washington State, whose 1992 campaign

32. Qualified state political committees must at minimum file the initial Form 8871 and make Form 8872 periodic reports to the IRS (or report similar information to a state regulator). *See* REV. RUL. 2003-49, 2003-1 C.B. 904-905 (2003).

33. ME. REV. STAT. ANN. tit. 21-A, §§ 1121-1128 (West Supp. 2003). *See also* Michael Saxl & Maeghan Maloney, Essay, *The Bipartisan Campaign Reform Act: Unintended Consequences and the Maine Solution*, 41 HARV. J. ON LEGIS. 465, 471-77 (2004).

34. *See* TEX. ELEC. CODE § 253. However, using corporate and union soft money for electioneering is a felony though there may be difficulties in enforcement because of no bright-line rule for what constitutes electioneering. *See, e.g.*, Fred Lewis, *Taking Back the Owner's Box*, THE TEXAS OBSERVER, Mar. 12, 2004 at 10 (advocating reforms such as an electioneering test based on BCRA), available at <http://www.texasobserver.org/showArticle.asp?ArticleID=1601> (last visited Oct. 1, 2004).

35. Staci D. Kramer, *The 527 Factor: It's Big in State Races, Too*, THE CHRISTIAN SCI. MONITOR, Sept. 23, 2004, at USA 3.

36. *See id.*; David Postman, *Chamber Ads Rile State Groups*, SEATTLE TIMES, Sept. 22, 2004 at B1, available at http://seattletimes.nwsourc.com/html/localnews/2002042689_chamber22m.html. As a 501(c)(6) organization, the Chamber would not be prevented from conducting such activity under the 527 Act, but could not use a 527 front as it had in Washington State. *See infra* notes 53-56 and accompanying text.

37. *Id.* In addition, donors to the U.S. Chamber who funded the campaign have not been disclosed, since the Chamber is a 501(c)(6) organization. *See infra* notes 53-56 and accompanying text. *See id.* (noting that Senn "would like to know who donated the money to the U.S. Chamber that was used to pay for the campaign"). However, the Chamber ads may have backfired, as a controversy over disclosure created a public backlash and Senn defeated her opponent in the primary. *See Kramer, supra*, note 35.

38. *See* Postman, *supra* note 36.

39. According to a report by the Brennan Center for Justice, in 2000, State Supreme Court candidates in twenty states raised \$45.6 million, an increase of 61% from 1998.

finance reforms exempt judicial candidates, one judicial candidate received close to \$100,000 from the building industry in this year's election cycle.⁴⁰ At the same time, a recent Supreme Court decision has overturned a state law prohibiting commentary on controversial issues while campaigning for elected judgeships.⁴¹ Electioneering by 527s on behalf of nonpartisan judicial offices would not continue to be unregulated under the 527 Act, yet in focusing on issues that divide along partisan lines they could affect turnout and general discourse during an election year.

Large donations can be even more influential in state contests, which receive less press coverage but whose outcomes arguably have even more impact on a citizen's daily life. Additionally, state elections impact the national political milieu as well—both indirectly by providing a “farm team” for national parties (and the federal courts),⁴² and directly; for example, each state's Secretary of State has significant influence over the way voting procedure occurs in his or her state.⁴³ Because the 527 Act does not concern these important state elections, closer attention should be paid to state elections—perhaps by the media and citizen watchdogs—particularly in those states whose own election laws diverge significantly from federal regulations.

See DEBORAH GOLDBERG, BRENNAN CENTER FOR JUSTICE, PUBLIC FUNDING OF JUDICIAL ELECTIONS: FINANCING CAMPAIGNS FOR FAIR AND IMPARTIAL COURTS 1 (2002), available at <http://www.brennancenter.org/resources/ji/ji3.pdf> (last visited Oct. 1, 2004).

40. See Sam Skolnik, *Campaign 2004: Money Pours Unchecked into State's Judicial Races*, SEATTLE POST-INTELLIGENCER, Oct. 11, 2004 at A1, available at http://seattlepi.nwsourc.com/local/194681_courts11.html (last visited Nov. 5, 2004).

41. Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002). There is a move among states to increase transparency and oversight of judicial elections, and this year, North Carolina became the first state to provide full public funding of judicial candidates. See Mike France & Lorraine Woellert, *The Battle Over the Courts: How Politics, Ideology, and Special Interests are Compromising the U.S. Justice System*, BUS. WK., Sept. 27, 2004, at 44.

42. See, e.g., Ralph Nader, *Complacency is Not Democracy*, WASH. POST, Oct. 9, 2004, at A31 (noting that “[a]bandonment [of state contests], as Texas's Ben Barnes has stated, deprives the Democratic Party of a farm team to nourish attractive candidates in the future.”).

43. See Jo Becker, *Behind the Scenes, Officials Wrestle Over Voting Rules*, WASH. POST, Oct. 10, 2004, at A10 (discussing ways in which state voting procedures may affect a particular party).

IV.
NONPROFITS AND CHURCHES

The proposed reforms mostly ignore other groups formed under the Internal Revenue Code (Code).⁴⁴ Some have argued that organizations formed under § 501(c) of the Code are the next channel for the flood of tainted money diverted from the parties and the 527s.⁴⁵ Part of this will be from an increased incentive to try to contravene existing tax laws, but even activity acceptable under the letter of the Code can be utilized for arguably political purposes. Organizations, including churches, which are tax-exempt under § 501(c)(3), are absolutely prohibited from engaging in partisan political activity⁴⁶ yet may engage in limited lobbying and unlimited nonpartisan educational activities.⁴⁷ Through voter education activities, nonprofits have an unlimited capacity to be involved in public policy issues. Although voter education cannot be conducted in a partisan manner,⁴⁸ by encouraging voting by a specific demographic group (i.e. a particular religious denomination or age group), one party may benefit indirectly. Organizations may also provide forums for candidates to speak in their capacity as public figures as long as the candidacy is not mentioned.⁴⁹ Additionally, group leaders as individuals have the ability to intervene on behalf of candidates. For instance, a church minister may endorse a candidate in a press conference reported in the news⁵⁰ or have his or her endorsement mentioned in an ad taken out by the candidate,⁵¹ without affecting the church's tax status. Therefore, though the actual forum is not subsidized by tax dollars, part of the authority and capac-

44. This was done intentionally by the sponsors. See News Conference, *supra* note 4 (stating "I want to be clear that nothing in the bill will affect 501(c) advocacy groups").

45. See, e.g., Letter from Public Citizen, Comments on Proposed Rulemaking on Political Committee Status (Apr. 5, 2004) (stating that "the prospects for abuse of the tax code will be considerably heightened if the FEC modifies its definition of political committees to capture Section 527s"), available at http://www.citizen.org/documents/FEC_Pol_Com_Comments_04-05-04.pdf (last viewed Oct. 1, 2004).

46. See I.R.C. § 501(c)(3). See also *United States v. Dykema*, 666 F.2d 1096, 1101 (7th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982); *Better Bus. Bureau v. United States*, 326 U.S. 279 (1945).

47. I.R.C. § 501(c)(3), (h).

48. I.R.C. § 501(c)(3); Judith E. Kindell & John Francis Reilly, *Election Year Issues*, CPE TECHNICAL INSTRUCTION PROGRAM FY 2002, 349–50, 378–79 (2002), available at <http://www.irs.gov/pub/irs-tege/topici02.pdf>.

49. See Kindell & Reilly, *supra* note 48, 380–82.

50. INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS: BENEFITS AND RESPONSIBILITIES UNDER THE FEDERAL TAX LAW 8, available at <http://www.irs.gov/pub/irs-pdf/p1828.pdf>.

51. *Id.*

ity to influence the electorate is derived from the office that the individual holds. In addition to voter-specific activities, general advocacy on behalf of such polarizing topics as abortion and tax policy may impact the political discourse. These are all sanctioned activities. However, with the increased restrictions on 527s, 501(c)(3) organizations may have an incentive to push the envelope in trying to characterize political activities as educational activities,⁵² straining the IRS's already limited enforcement efforts.

Section 501(c)(3) organizations may also engage in limited lobbying activity; groups organized under 501(c)(4) (social welfare organizations) and 501(c)(6) (business leagues) may conduct unlimited lobbying efforts. "Lobbying" is defined in this context as attempting to influence legislative activity, including actions by the public such as referendums, ballot initiatives, and constitutional amendments.⁵³ This includes legislation such as constitutional amendments to ban gay marriage or referendums to increase the minimum wage, which may have the effect of both increasing voter turnout and defining electoral discourse to the benefit of one party or another. Direct voter drive activity must be nonpartisan, but by emphasizing certain issues or targeting particular groups it will not necessarily have a neutral effect.⁵⁴ 501(c)(4) and 501(c)(6) organizations may also engage in a limited amount of partisan political activity.⁵⁵ This political activity is not required to be reported to the FEC. It should be disclosed to the IRS on the Form 990 annual return; however, confusion (and sometimes exploitation of that confusion) has led to many groups aggregating lobbying and political expenditures, which frustrates both disclosure and enforcement purposes.⁵⁶

52. See Frances Hill, *Corporate Philanthropy and Campaign Finance: Exempt Organizations as Corporate-Candidate Conduits*, 41 N.Y.L. SCH. L. REV. 881, 927-30 (1997).

53. I.R.C. § 4911(d)-(e) (defining "influencing legislation").

54. Nonpartisan groups had an increased role in voter drives during the 2004 election compared to previous years; spending on get-out-the-vote campaigns by nonpartisan groups and 527s alone exceeded \$350 million. See Michael Moss & Ford Fessenden, *Interest Groups Mounting Costly Push to Get Out Vote*, N.Y. TIMES, Oct. 20, 2004, at A1.

55. I.R.C. § 501(c)(4), (c)(6); Rev. Rul. 81-95, 1981-1 C.B. 332. See John Francis Reilly & Barbara A. Braig Allen, *Political Campaign and Lobbying Activities of IRC 501(c)(4), (c)(5), and (c)(6) Organizations*, EXEMPT ORGANIZATIONS-TECHNICAL INSTRUCTION PROGRAM FOR FY 2003, at L-2-L-3, available at <http://www.irs.gov/pub/irs-tege/eotopicl03.pdf>.

56. See Report by Public Citizen, *The New Stealth PACs: Tracking 501(c) Non-profit Groups in Elections*, at 62 (Sept. 2004), available at <http://www. stealthpacs.org/documents/mainreport.pdf> (last visited: Oct. 1, 2004).

Adding to the difficulty in tracking expenditures is the use of complex affiliate relationships. For instance, MoveOn.org is often cited by opponents as symptomatic of the 527 problem, yet most of its negative ads are run by the MoveOn PAC and not the 527.⁵⁷ In addition to the MoveOn PAC and the MoveOn Voter Fund, the group also has a 501(c)(4) affiliate.⁵⁸ A 501(c)(3) organization can form a 501(c)(4) affiliate for lobbying as long as the groups are incorporated separately and tax-deductible funds are not used by the affiliate,⁵⁹ which itself can set up an action fund to use for candidate intervention.⁶⁰ Therefore, as long as expenses are reasonably allocated, 501(c)(3) organizations can be affiliated with 501(c)(4) organizations, with related 527 action funds.⁶¹ Although this is likely the normal allocation practice already, the 527 Act clarifies that overhead costs for the fund may be paid by the 501(c)(4) affiliate.⁶²

Few advocate placing FECA restrictions on 501(c) groups, since it could have a chilling effect on legitimate nonprofits doing important non-electoral issue advocacy.⁶³ However, 501(c) groups should not

57. See Linda Feldmann, *Political Ads: Cash Still King*, CHRISTIAN SCI. MONITOR, Aug. 25, 2004, at 1.

58. *Id.* at 10 (stating that “[t]he complicated network that Moveon has become reflects the nature of how political advocacy shifts and morphs to conform to laws and regulations—and the desires of donors.”).

59. See *Regan v. Taxation With Representation*, 461 U.S. 540 (1983); Rev. Rul. 80-108, 1980-1 C.B. 119.

60. See *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. 2000). A 501(c)(4) can make “exempt function” (defined under I.R.C. § 527(e)(2) as “the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected or appointed”) expenditures through a “separate segregated fund” established under I.R.C. § 527(f).

61. Treas. Reg. § 1.162-28(b). See generally Ward L. Thomas & Judith E. Kindell, *Affiliations Among Political Lobbying and Educational Organizations*, in EXEMPT ORGANIZATIONS CONTINUING PROFESSIONAL EDUCATION TECHNICAL INSTRUCTION PROGRAM FY 2000 255–66 (1999).

62. S. 2828, 108th Cong. § 4 (2004). Allocation rules are stricter, however, regarding 501(c)(3) organizations. See generally Thomas & Kindell, *supra* note 61, 255–59; Rosemary E. Fei & Gregory L. Colvin, *How to Set up and Maintain an Action Fund Affiliated with a Charity*, 15 TAX’N OF EXEMPTS 184 (2004).

63. However, Judge Kollar-Kotelly recently ruled that the FEC regulations exempting 501(c)(3) groups from electioneering restrictions did not adequately enforce BCRA. See *Shays v. F.E.C.*, *supra* note 6. Cf. Thomas B. Edsall & James V. Grimaldi, *New Routes for Money to Sway Voters, 501(c) Groups Escape Disclosure Rules*, WASH. POST, Sept. 27, 2004, at A1. But see *Bill to Regulate Independent Political Committees Introduced in Congress*, NONPROFITADVOCACY.ORG, SEPT. 28, 2004 <http://www.nonprofitadvocacy.org/index.html>, at (listing concerns of nonprofits regarding the 527 Act, including that the language does not explicitly exempt 501(c) organizations).

be ignored as vehicles of influence, either in terms of ideology or method.⁶⁴ For instance, from 1999 to 2001, conservative foundations gave over \$115 million to policy think tanks, mostly in the amorphous form of “operating support” funds, according to the National Committee for Responsive Philanthropy.⁶⁵ Such organizations can help nourish political movements, by providing the intellectual support for policy positions and by educating movement participants. Although nonprofits may not always have the immediate, direct visibility of negative television ads, through the articulation of ideas and mobilization of individuals sympathetic to those ideas 501(c) organizations can have tremendous impact not only on setting the agenda but also on the outcome of elections.

V.

CONCLUSION

Representative Christopher Shays, one of the sponsors of the House version of the 527 Act, noted that by enacting BCRA and proposing the 527 Act, the reformers did not intend to limit speech; rather, they “just didn’t want corporate money, forced union dues money and unlimited sums to drown out the voice of individual Americans.”⁶⁶ However, unlimited sums are still allowed by 527s solely focused on “nonpartisan” state contests and by 501(c) organizations. This argument is not so much a critique of campaign finance reform efforts but an assertion that such efforts may not be sufficient to create the kind of democracy for which we would hope. As long as it is effective, money will be spent to influence the electorate. BCRA and the 527 Act may even push that money in directions that fall under the radar, perhaps towards greater state and 501(c) activity.⁶⁷ Additionally, the voices of some individual Americans, particularly low-income and minority, may still be drowned out by national 527s. Since ideology has become so important in American elections, particularly in the wake of BCRA, the 527 Act gives disproportionate influence to

64. See generally Matt Bai, *Wiring the Vast Left-Wing Conspiracy*, N.Y. TIMES MAGAZINE, July 25, 2004, at 30 (describing impact of policy, training, and advocacy groups on “incubating” political movements).

65. JEFF KREHELY ET AL., NATIONAL COMMITTEE FOR RESPONSIVE PHILANTHROPY, *AXIS OF IDEOLOGY: CONSERVATIVE FOUNDATIONS AND PUBLIC POLICY* 17–18 (March 2004).

66. See News Conference, *supra* note 4.

67. In addition to being harder to trace, money given as “philanthropy” rather than directly toward the electoral process is viewed more favorably by the public. See, e.g., *Giving Something Back: A Golden Age of Philanthropy May be Dawning*, ECONOMIST, June 16, 2001, at 15.

the ideology of those who arguably fit a certain demographic. Although BCRA did well to combat the phenomenon of candidates acting merely as stand-ins for corporations, a shift to candidates acting as stand-ins for an ideology is also harmful to citizens.